No. 00-1423

In the Supreme Court of the United States

KATHLEEN A. LEAHY, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
STUART E. SCHIFFER
Acting Assistant Attorney General
WILLIAM KANTER
DANIEL L. KAPLAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Merit Systems Protection Board properly declined to exercise subject matter jurisdiction over petitioner's appeal, when the subject of that appeal was already the basis of a pending district court action initiated by petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported. The opinions of the Merit Systems Protection Board (Pet. App. 5a-6a, 7a-17a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 2000. The petition for a writ of certiorari was filed on March 12, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In October 1997, petitioner was removed from her position as a protocol specialist with the Department of

the Army for conduct unbecoming of a federal employee, defiance of supervisory authority, and false statements to a supervisory official. Shortly thereafter, petitioner filed a "mixed case appeal" of the agency's decision of removal with the Merit Systems Protection Board (MSPB or Board), alleging that her removal both violated the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, and amounted to unlawful discrimination. See 5 U.S.C. 7702, 7703(b)(2); Pet. App. 1a.[1] In January 1998, petitioner made an untimely request for discovery in connection with her appeal. Pet. App. 8a, 12a n.1. To accommodate that request, the Administrative Judge dismissed petitioner's appeal without prejudice, and informed petitioner that she could refile the appeal no sooner than 45 days and no later than 90 days from the date of the dismissal. *Ibid.*

On March 23, 1998—more than 45 days after petitioner's appeal was dismissed by the MSPB—petitioner filed a civil action in the United States District Court for the Southern District of Georgia, alleging that her removal violated Title VII of the Civil Rights Act of 1964. Pet. App. 9a.[2] In May 1998, petitioner then refiled her appeal with the Board. *Ibid.* The Administrative Judge dismissed petitioner's appeal for lack of subject matter jurisdiction, concluding that

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[1] "A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age." 29 C.F.R. 1614.302(a)(2).

[2] The district court granted the agency's motion for summary judgment on August 30, 1999, and denied petitioner's Title VII claim on the merits. *Leahy* v. *Caldera*, No. CV 498-93 (S.D. Ga.). The Eleventh Circuit affirmed in an unpublished decision. *Leahy* v. *Caldera*, 228 F.3d 415 (2000) (Table).

"when [petitioner] elected to first file with the [district] court, she chose to remove the matter from the Board's jurisdiction." *Id.* at 13a n.1.

The Administrative Judge first observed that the Board's jurisdiction "is limited to those areas specifically granted by law, rule, or regulation." Pet. App. 8a. The Administrative Judge then explained that the governing statute permits an aggrieved employee to bring a mixed case appeal to the Board and, if no judicially reviewable decision is issued by the Board within 120 days following the filing of such an appeal, to bring an action in federal district court challenging the same agency action. *Id.* at 9a (citing 5 U.S.C. 7702(e)(1)). The Administrative Judge concluded that, "[b]ecause [petitioner] filed her complaint in district court prior to refiling her appeal with the Board, and because [petitioner] had the option of first refiling her appeal with the Board, the Board lacks subject matter jurisdiction over the mixed-[c]ase appeal of her removal." *Ibid.*

In so holding, the Administrative Judge recognized that the Federal Circuit has held that an appellant removes an appeal from the Board's jurisdiction by electing to first file suit in district court, reasoning that parties should not be permitted to "litigat[e] the same case in the United States Courts and in the administrative process." Pet. App. 9a (quoting *Connor* v. *United States Postal Serv.*, 15 F.3d 1063, 1065-1066 (Fed. Cir. 1994)). In addition, the Administrative Judge noted that the Equal Employment Opportunity Commission (EEOC)'s regulations governing the processing of mixed-case complaints specify that the filing of a district court action requires the Commission to dismiss an administrative complaint based on the same conduct, and reasoned that "for purposes of consistency * * *,

the Board should follow EEOC's practice." *Id.* at 11a (citing 29 C.F.R. 1614.107).

Petitioner petitioned for review of the Administrative Judge's decision before the full Board. "After full consideration," however, the Board denied that petition. Pet. App. 5a-6a.

2. Petitioner appealed to the Federal Circuit, see 5 U.S.C. 7703(b)(1) (1994 & Supp. V 1999), which affirmed in an unpublished decision (Pet. App. 1a-4a). The court of appeals explained that, under the existing regime, "[a]n employee who alleges that an agency action normally appealable to the Board is related to employment discrimination has several paths via which to pursue her mixed case," except that "the statutes and regulations provide no scenario in which an employee may file a mixed case appeal with the Board after filing a district court action for discrimination." Pet. App. 2a-3a (citing 5 U.S.C. 7702(a)(1), 7702(e)(1); 5 C.F.R. 1201.154(a); 29 C.F.R. 1614.302(b), 1614.302(d), and 1614.310(h)). The court concluded that, "[a]fter the initial appeal of her removal was dismissed without prejudice, [petitioner] had a choice * * * of again filing an appeal of the removal with the Board or filing a discrimination action in district court. She chose the latter, thereby foreclosing a later appeal with the Board." *Id.* at 3a.

ARGUMENT

The court of appeals' unpublished decision does not conflict with any decision of this Court or of any other court of appeals, and it comports with the statutory and regulatory regime governing mixed case appeals to the MSPB. Further review is not warranted.

1. As the Federal Circuit explained, the statute and regulations governing mixed case appeals to the MSPB

—*i.e.*, appeals that include claims of unlawful discrimination—afford aggrieved employees with several procedural paths for adjudicating their claims. See Pet. App. 2a. An employee who believes her removal was motivated by unlawful discrimination may appeal her removal to the MSPB, or challenge it directly with the agency. 5 U.S.C. 7702(a)(1); 5 C.F.R. 1201.154(a); 29 C.F.R. 1614.302(b). After the MSPB has issued a decision, the employee may petition the EEOC to consider the decision. 5 U.S.C. 7702(b)(1); 29 C.F.R. 1614.303(a). In addition, an employee may file a district court action challenging her removal if, within 120 days after she has filed a mixed case appeal with the Board or the agency, there is no judicially reviewable action. 5 U.S.C. 7702(e)(1)(A)-(B); 29 C.F.R. 1614.310(g)-(h). Neither the statute nor the MSPB's regulations specifically address whether the Board must entertain a mixed case appeal after the employee has filed a district court action involving the same matter.

Under the existing regime, the Federal Circuit and MSPB properly concluded in this case that petitioner "had a choice": she could "fil[e] an appeal of the removal with the Board," or "fil[e] a discrimination action in district court." Pet. App. 3a. But, as the Federal Circuit and MSPB held, petitioner was not guaranteed the right to proceed in the district court and the MSPB at the same time. See *id.* at 3a, 9a, 12a n.1.

That conclusion squares with existing Federal Circuit precedent. In *Connor* v. *United States Postal Service*, 15 F.3d 1063, 1066 (Fed. Cir. 1994), for example, the court of appeals held that the MSPB lacked jurisdiction over an employee's mixed case appeal when, before filing that appeal, the employee had filed a district court action challenging his removal based on the same allegations of discrimination underlying the

MSPB appeal. As the court recognized, there are two related defects with that assertion of jurisdiction. First, "there is no statute or regulation granting jurisdiction to the Board over [an] appeal" in those circumstances. *Id.* at 1065. Second, parties should not be permitted to "simultaneously 'litigat[e] the same case in the United States Courts and in the administrative process.'" *Ibid.* (quoting *Colon* v. *Chairman*, 723 F. Supp. 842, 844 (D.P.R. 1989)). See Pet. App. 9a-10a. A contrary rule would require the agency to defend against the same dispute in two separate fora at the same time and invite confusion and contradictory rulings.[3]

Relying upon 5 U.S.C. 7702(e)(1)(B), petitioner argues (Pet. 4) that she was permitted to file her district court action because "there was no judicially reviewable action by the 120th day after she lodged her mixed case appeal with the Board." But that provision is of no assistance to petitioner because it does not purport to grant continuing jurisdiction to the Board. At best, Section 7702(e)(1)(B) only supports the con-

[3] This Court has relied upon similar prudential considerations in holding that federal courts should refrain from exercising their jurisdiction in light of duplicative proceedings. See, e.g., *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976) (federal district court properly declined to exercise jurisdiction over complaint overlapping with pending state court proceeding where federal statute evinced policy against piecemeal adjudication); *Kerotest Mfg. Co.* v. *C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952) (federal district court should decline to exercise jurisdiction over complaint overlapping with action pending in another federal district court); *Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491 (1942) (federal district court should decline to exercise jurisdiction over complaint overlapping with pending state proceeding if parties' claims could be satisfactorily adjudicated in the state proceeding).

clusion that petitioner was permitted to file an action in district court when the 120-day period lapsed, and not that the Board has continuing jurisdiction to entertain an appeal when the employee exercised the option to litigate the same matter in district court.

2. Petitioner claims (Pet. 3) that the Federal Circuit's decision in this case conflicts with *Butler* v. *West*, 164 F.3d 634 (D.C. Cir. 1999). That contention is without merit.

Butler did not concern the MSPB's jurisdiction to process mixed case appeals. Instead, *Butler*, like the statutory provision it interprets, 5 U.S.C. 7702(e)(1)(B), deals with when "the district court has jurisdiction" over an action that is the subject of a mixed case appeal. 164 F.3d at 643. *Butler* held that, "where the complainant has neither deliberately abandoned the administrative regime, nor refused to cooperate in its processes, and has herself followed the rigorous time limitations prescribed by section 7702, section 7702(e)(1)(B) explicitly sanctions a civil action in the federal district courts once 120 days have passed without a final decision from the MSPB." *Ibid.* (citations omitted). *Butler* does not directly address the effect that the exercise of jurisdiction by a district court has on the MSPB's exercise of jurisdiction over a mixed case appeal.[4] And *Butler* in no way establishes that the MSPB was required to entertain petitioner's MSPB

[4] This case is significantly different from *Butler*. In this case, the complainant did not follow the time limitations prescribed by Section 7702 and did not afford the MSPB an opportunity to decide her appeal *before* filing suit in district court. Instead, petitioner filed suit in district court before she refiled her MSPB appeal. Under *Butler*, therefore, it is questionable whether the district court was required to entertain petitioner's district court action.

appeal when petitioner opted to file her district court action before obtaining a decision from the MSPB.

Petitioner points (Pet. 3-4) to the court of appeals' observation in *Butler* that it "s[aw] no reason why the district court [could not] stay the case, or hold it in abeyance, for a reasonable period of time," while the Board processed a pending appeal dealing with the same subject matter. 164 F.3d at 643. That passage is dictum, merely suggesting a prudent course of action for a district court to take when an action is filed after the 120-day period established by Section 7702(e)(1)(B) has lapsed and no final decision has been issued by the MSPB. The court of appeals did not purport to decide, or engage in any in-depth analysis of, the jurisdictional foundation of the MSPB's continuing involvement in the case. Moreover, to the extent that that dictum suggests that the MSPB *may* retain jurisdiction over a mixed case appeal after a district court action in the same matter has been filed, the dictum in no way indicates that the Board *must* exercise such jurisdiction in general, let alone exercise such jurisdiction when, as here, a complainant elects to proceed in district court before she has even exhausted her MSPB appeal.[5]

Petitioner also claims (Pet. 7-8) that the Federal Circuit's decision in this case conflicts with the court's own precedents. This Court does not grant certiorari to

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[5] Another passage from *Butler* cites the Board's decision in *Connor* v. *United States Postal Service*, 52 M.S.P.R. 588 (1992), for the proposition that the filing of a civil action in district court does not automatically terminate the Board's jurisdiction over a mixed case appeal. See *Butler*, 164 F.3d at 641-642. The Federal Circuit, however, reversed that decision and reached the opposite conclusion with regard to the permissibility of parallel proceedings in such circumstances. See *Connor* v. *United States Postal Serv.*, 15 F.3d at 1064.

resolve intra-circuit conflicts. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974). In any event, no such conflict exists here. As the court of appeals itself recognized (see Pet. App. 3a), the Federal Circuit's unpublished decision in this case is consistent with the result in *Connor* v. *United States Postal Service*, 15 F.3d at 1065. See Pet. App. 9a-10a. Petitioner also asserts (Pet. 6-7) that the decision below conflicts with *McGovern* v. *EEOC*, 28 M.S.P.R. 689 (1985). That conflict also would provide no basis for granting certiorari. Nevertheless, as the Federal Circuit explained in *Connor*, in *McGovern* "the MSPB filing preceded the district court filing." 15 F.3d at 1066. Here, as in *Connor*, the opposite is true. In addition, as the Administrative Judge explained below, the rationale of *McGovern* has been undercut by regulatory changes since that case was decided. Pet. App. 10a-11a.

3. Petitioner argues (Pet. 9) that this Court should grant certiorari to review "the entire constitutionality of the Board's dismissal of [her] appeal without prejudice." That issue, however, was not addressed by the court of appeals below, and therefore is not suited for plenary review by this Court. In any event, petitioner's argument—which fails to identify any particular constitutional provision that was violated by the dismissal—is without merit. As petitioner acknowledges (Pet. 10), the Administrative Judge dismissed petitioner's appeal without prejudice to accommodate petitioner's late-filed request to engage in discovery, not to circumvent the 120-day requirement. See Pet. App. 8a, 12a n.1. That dismissal, moreover, did not preclude petitioner from refiling her MSPB appeal and seeking to adjudicate

that appeal—a course of action petitioner declined to take in favor of filing her district court action.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
WILLIAM KANTER
DANIEL L. KAPLAN
Attorneys

MAY 2001

[6] Petitioner suggests (Pet. 12) that the Court should "declare[] invalid" the portion of 29 C.F.R. 1614.302 requiring a mixed-case complaint to be filed either with the agency or with the Board. That regulation, however, is not implicated where, as here, the parallel proceeding is filed in district court, rather than in the agency. In any event, the regulation is consistent with the statutory scheme established by Congress and the practical considerations discussed above concerning duplicative litigation.